REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 200 OF 2011

ALEX KIBET ALISON...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

[Appeal from the Conviction and Sentence of the Nakuru Chief Magistrate's A/Criminal Case No.l36 of 2011by Hon. B. Kituyi, Resident Magistrate delivered on 10th August, 2011]

JUDGMENT

1. The Appellant was charged with the offence of **defilement** contrary to **Section 8(1)** as read together with **Section 8(3)** of the **Sexual Offences Act**. The particulars of this offence were that on diverse dates between 1st December 2010 and 31st July 2011 at *[particulars withheld]* Village-njoro, he unlawfully and intentionally committed caused his male genital organ to penetrate into the female genital organ of B.C.M. a child aged 14 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of this offence were that on diverse dates between 1st December 2010 and 31st July 2011 at *[particulars withheld]* Village- Njoro, he unlawfully and intentionally committed an indecent act with B.C.M. who was 14 years by touching her private parts namely, vagina and breasts.
3. The Appellant pleaded guilty to both the main and alternative counts. He was convicted on the main count and sentenced to 20 years imprisonment in terms of **Section 8(3)** of the
4. In his amended Petition filed on 28th February 2015, he has appealed against both the conviction and sentence. His grounds of appeal are that:

(a) he was coerced by the Police to plead guilty under the guise that he would only be sentenced to probation;

(b) he did not understand the language of the court or the seriousness of the offence with which he was charged;

(c) he was not informed of the consequences of pleading guilty to the charge; and

(d) the trial court did not order for that the Appellant undergoes assessment before sentencing him.

5. At the hearing of the appeal, the Appellant appeared in person. He did not make further submissions and relied on his petition of appeal. The Prosecuting Counsel, conceded the appeal in part. He agreed that there was a miscarriage of justice because from the record, the trial court used Kiswahili a language which the Appellant clearly did not understand.
6. Counsel submitted that the charges and facts of the case, were read to the accused in Kiswahili. He did not comprehend the proceedings and was therefore not able to offer any mitigation. In these circumstances, this court ought to refer the matter to another court for retrial.
7. This being the first appellate court, it is incumbent upon it to re-assess and re-evaluate the evidence recorded by the trial court and to arrive at an independent conclusion. Refer to **Okeno** V. **Republic**, [1973) EA 32.

ANALYSIS

8. The procedure for taking plea was laid out in Adan vs Republic [1973] EA 445 and again restated by the same court in John Muendo Musau v Republic [2013] eKLR*:*-

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

ii. ***The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***

iii. ***The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***

iv. ***If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

1. The record shows that the trial court carefully followed this procedure. The record shows that the charges and all its elements were read to the Appellant in Kiswahili, a language that he understood, and he answered to both the main and alternative counts:

"It is true"

2. Accordingly, a plea of guilty on both counts was entered. The prosecutor proceeded to read the facts of the case to the Appellant in details. He was informed that in the month of December he defiled the complainant who was a child aged fourteen years. He continued defiling the complainant until 30th and 31st July 2011. When she was examined on 1st August 2011, she was found to be thirty four weeks pregnant.
3. To these facts, the Appellant responded:

"Facts are correct."

4. The Appellant was convicted of the main charge and when asked to offer any mitigation, he stated:

"I have no mitigation to give."

5. There is no indication in the proceedings that the Appellant did not understand the language used. His response to the charges and the facts did not indicate that he did not understand the court. Although the court has the obligation to uphold the right to fair trial by ensuring that an accused person understands the charges and the trial, an accused person also has an implied duty to inform the court whether or not he is able to understand the proceedings. This duty however does not

lessen the obligation of the court satisfy itself that the accused is able to follow the proceedings.

6. This was the holding of the Court of Appeal in **Gichangi & 3 Others vs Republic [2007] 2 KLR.** The court further held that in an appropriate case where there is no complaint at the trial, the appellate court may well infer that there was interpretation where the proceedings show the accused person understood the nature of the charges against him regardless of the fact that the language is not indicated.
7. I am satisfied that the Appellant understood the language of court. In my view the complainant is an afterthought after he realised the gravity of the offence and severity of the sentence meted out to him.
8. This view is supported by the contention of the Appellant that he was coerced into pleading guilty by the Police under the false promise that he would receive a light sentence. At the time of taking plea, his mindset was to accept the charges. Further, he did not raise the issue of being threatened by the Police in order to accept charges in the trial court and no evidence has been offered to support his contention.
9. I find that the plea of guilt was unequivocal and therefore find no reason to interfere with the conviction. The prosecution counsel in this case, wrongly conceded to the appeal.
10. With regard to the legality of the sentence, the Appellant alleged that the sentence was unlawful because the trial court did not order that an age assessment be done on him before sentencing.
11. For offences under the Sexual Offences Act, the age of the victim is pertinent because it is the determinant of the sentence which will be meted to an accused person. There is no requirement for ascertainment of the age of an accused.
12. Section 8(3) of the Sexual Offences Act provides that a person who is convicted of defiling a child between the age of 12 and 15 years is liable to imprisonment for a term of not less than 20 years. The twenty years imprisonment meted out to the Appellant was lawful and cannot be interfered with by this court.

DETERMINATION

13. In the end, I find that this appeal has no merit and hereby dismiss the same.

Accordingly the conviction and sentence is hereby upheld.

Orders accordingly.

Dated Signed and Delivered at Nakuru this 19th day of June, 2015.

A. MSHILA

JUDGE